Intergovernmental Conflicts in Land Acquisition: Adjustment for Maximum Public Benefit

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Is a park better than a courthouse; a road than a school, or an airfield than a waterworks? Legislators, judges and administrators are frequently faced with the problem of deciding how these questions shall be shaped for answer, and who shall answer them. Almost without exception, production and services require land-area for their accomplishment; they are forms of land use. The number and range of our governmental and other public activities have increased and accelerated. The quantity of land devoted, and needs for land to be devoted, to what are legally termed "public uses" have multiplied; there are and will be more and larger highways, reservoirs, airports, customshouses, power plants, cemeteries and sewers. The total of suitably located and modified land has scarcely kept pace. It can do so only through efficient employment of the area available. The threat of maladjustment in uses shows itself in conflicts among our myriad of governments, government agencies and public service corporations; in efforts by more than one such body to acquire and use the same real property for one public purpose to the partial or total exclusion of others.

CONDEMNATION ASPECTS OF THE PROBLEM

We are here concerned with an analysis of the power of a federal, state or local government, its agency, or a public utility, to take or authorize the taking for public use of land held for the same or a different public use by another such government, agency or utility. The attempt to effect the shift in land use may be made by legislation, either general or ad hoc, administratively, or by a combination of means. In the typical situation one (the taker) or both of the public bodies involved may possess to some extent a form of power to administer property in the public interest—the power of eminent domain. Among other ways, therefore, the inter-agency conflict may come before the courts in the guise of a lawsuit to exercise this power, *i.e.*, in condemnation proceedings. The general question of compensation for the condemnation or transfer is beyond the scope of the present inquiry; it is assumed that compensation is forthcoming when required by law. It is also assumed that if the land were privately owned and devoted to private use no impediment to the taking would exist.

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A technicality prevents the problem from arising in condemnation as often as would otherwise happen, although it does not prevent other forms of litigation. Land acquired for federal agencies is taken and held in the name of the United States of America.[1] An effort by one federal agency to condemn land used by another would present the impossibility of a suit by the United States against itself. Questions of necessary shifts in land use are presently resolved directly by Congress or administratively by the President,[2] the Public Buildings Administration,[3] the Federal Real Estate Board,[4] or the agencies involved. A very considerable number of state agencies take and hold title in the name of the state, and condemnations between them are likewise impossible,[5] the matter of shifts in use being often handled by direct action of the state legislature.[6] This means a special act every time a change of use is to be made. Administrative machinery for handling the less important but often numerous decisions is frequently either lacking or meager.[7] Many state agencies and many local governmental units are, however, considered sufficiently separate entities to hold at least legal title in their own names, and are therefore in a position to attempt to condemn property from one another. Likewise, different governments or their agencies may contend for the same land. In this process the problem of choosing among competing public uses is posed for the condemnation court.

As a preliminary, the legal analysis customarily employed in dealing with the simple condemnation of private property may be outlined. Subject to constitutional limitations, the state and federal

[1] See, *e.g.*, 56 STAT. 174 (1942), 15 U.S.C. § 606b (1946) (Reconstruction Finance Corporation); 46 STAT. 60 (1933), 16 U.S.C. § 831c (1946) (Tennessee Valley Authority).

[2] U. S. CONST. ART. IV, § 3. For examples of Congressional and Presidential shifts of property use, see 60 STAT. 765, 42 U.S.C. § 1809 (1946); 55 STAT. 838 (1941), 50 U.S.C. APP. § 601 (1946); United States v. Chum Chin, 150 F. 2d 1016 (C.C.A. 9th 1945).

[3] In the Federal Works Administration. Reorg. Plan I, § 303, 53 STAT. 561 (1939), 5 U.S.C. § 133 (1946). The Deputy Commissioner for Real Estate Management assigns space in federal buildings throughout the country.

[4] Created by Exec. Order No. 8034, 3 CODE FED. REGS. 443 (Cum. Supp. 1943).

[5] People v. Sanitary Dist., 210 Ill. 171, 71 N.E. 334 (1904).

[6] As in Monaghan v. Armatage, 218 Minn. 108, 15 N.W. 2d 241 (1944), *appeal dismissed*, 323 U.S. 681 (1944).

[7] One effort to supply this need is VA. CODE ANN. § 3832 (1942): "No corporation shall take by condemnation proceedings any property belonging to any other corporation possessing the power of eminent domain unless after hearing all parties in interest, the State Corporation Commission shall certify that a public necessity or an essential public convenience shall so require and shall give its permission thereto; and in no event shall one corporation take by condemnation proceedings, any property owned by and essential to the purpose of another corporation possessing the power of eminent domain."

governments have the power to extinguish private property rights. The extinguishment of such rights as the result of the appropriation for public use of the land with respect to which they exist creates a privilege in the taker to prevent the future exercise of the rights by the persons bound by the condemnation proceedings, and is an exertion of the power of eminent domain.[8] The legislature may itself determine the need for shifting land from private to public use, and select the exact location, quantity and quality of interest to be taken. Or the legislature may by statute delegate a power of eminent domain to its agency or to a private corporation or individual, including the power to determine the necessity of taking particular private property. Selection of the specific land to be taken seems to be a legislative determination, whoever makes it, but the courts are not completely agreed on the extent to which it is subject to judicial review.[9] Despite variations in expression, most of the cases can be reconciled with a single position: if the intended use is public, a decision by the legislature or its agency or the grantee of a general grant of the power of eminent domain, as to the necessity of taking specific land is reviewable, if at all, only for bad faith, arbitrary action or abuse of discretion.[10]

Frequently, instead of being privately owned and used, the land is already devoted to public use.[11] Then the dilemma which concerns us here arises. The condemnor decides that it needs such land for its public purposes, but the holder decides that its own needs require it to resist the taking. The court in which the condemnation proceeding is brought seems to be required, whether it "reviews" anything or not, to affirm one decision (thus reversing the other), or to import and enforce some compromise.

By far the greater number of cases has arisen out of a state context. The conflicts are among states and such local units as

[8] This phraseology follows that of the RESTATEMENT, PROPERTY § 507, comment *a* (1944).

[9] On the question of what is meant by review, see Davis, *Nonreviewable Administrative Action*, 96 U. OF PA. L. REV. 749 (1948).

[10] City of Eugene v. Johnson, 192 P. 2d 251 (Ore. 1948); May v. City of Kearney, 145 Neb. 475, 17 N.W. 2d 448 (1945); Dallas v. Malloy, 214 S.W. 2d 154 (Tex. Civ. App. 1948); Porter v. Board of Sup'rs of Monona County, 238 Iowa 1399, 28 N.W. 2d 841 (1947); *In re* Joe's Downtown, 80 N.Y.S. 2d 41 (Sup. Ct. 1947); State *ex rel.* St. Paul & Tacoma Lbr. Co. v. Dawson, 25 Wash. 2d 499, 171 P. 2d 189 (1946). Even in some states which call the determination of necessity judicial the same test is used. Johnson v. Consolidated Gas, Elect. Light & Power Co., 50 A. 2d 918 (Md. 1947). A state constitution may place the determination elsewhere. Cleveland v. Detroit, 322 Mich. 172, 33 N.W. 2d 747 (1948) (jury).

[11] In this connection "devoted" does not mean dedication without use, or mere permission; there must be a legal obligation to maintain the public use. Bailey v. Anderson, 182 Va. 70, 27 S.E. 2d 914 (1943), *cert. denied*, 321 U.S. 799 (1944).

counties, townships, cities, towns and villages; as well as among school districts, levee districts and other ad hoc or special-function units. Since under our system the power of eminent domain is dormant in the absence of some form of legislation,[12] problems arising from its exercise are almost always treated by the courts as matters of constitutional and statutory interpretation. Over a long series of interplaying enactments and decisions a variety of theories for the resolution of this inter-agency conflict have evolved. Actually, they overlap; the following artificial segregation is made for purposes of description.

THE STATE METHOD: JUDICIAL SUBSTANTIVE ADJUSTMENT

The power of a state legislature to authorize the shifting of land in public use to another public use is not disputed, and the problem is ascertainment of the legislature's intent. When this is clearly manifested, the legislature has spelled out the answer as between the contenders. But if the state's general delegation of the power of eminent domain is made, as it usually is, to scores or hundreds of public and private corporations,[13] the courts are forced to formulate rules of construction—bluntly, to construct a result which is to represent what the legislature would have decided if the precise question as to possible conflict in land uses had been put to it. The literal application of each grant of the power of eminent domain would affirm the decision to take in every case, allowing condemnor *A* to take from *B*, *B* to retake from *A*, and so on. The unsuccessful party would be the one first exhausted by the expense of litigation, and this construction has been rejected.[14] At the opposite extreme is the construction that property once devoted to public use can under no circumstances be shifted to a different public use under a general delegation of eminent domain. Every change would then depend upon a special statute, and this view has likewise been rejected.[15]

Instead, where the uses are inconsistent a legislative intent not to authorize the shift is presumed. The rule most frequently declared is that property already devoted to public use may not be

[12] Oklahoma City v. Local Federal Savings & Loan Ass'n, 134 P. 2d 565 (Okla. 1945).

[13] *E.g.*, ALA. CODE ANN. tit. 10, § 71 (1940): "Corporation formed for the purpose of constructing, operating or maintaining railroads, street railroads, gas or electric works, water companies, power companies, canals, terminals, bridges, viaducts, wharves, piers, telegraph or telephone lines, or any other work of internal improvement or public utility, may exercise the power of eminent domain in the manner provided by law." There are broader provisions in CAL. CIV. CODE § 1001 (1941) and CAL. CODE CIV. PROC. ANN. § 1238 (Supp. 1948).

[14] Ridgewood v. Glen Rock, 15 N.J.Misc. 65, 188 Atl. 698 (Sup. Ct. 1936).

[15] Central Bridge Corp. v. Lowell, 4 Gray 474, 482 (Mass. 1855).

condemned for an inconsistent public use unless authorized expressly or by necessary implication.[16] Whether the authority is necessarily implied in a general statutory authorization depends upon the circumstances of the individual condemnation.[17] Where no such implication arises, this general rule disallows the shift on the basis that priority in time gives priority in right.

Other decisions take a different tack. The existing and proposed uses are evaluated, and if the proposed use is found to be "higher" or "superior" or "more necessary" than the existing use, the taking will be permitted under general authorization.[18] This rule of adjustment may involve either evaluation of the uses in general or as they appear in the particular situation. What seems to be a similar doctrine, although it has the longer history, is the distinction between governmental and proprietary uses. Land owned by a government, but held for so-called proprietary uses is often declared subject to taking under general authority, even by a non-government body, while land in governmental use may not be taken.[19] This rule has been employed as the basis for adjustment between two states; one state's railroad property within another state is subject to the latter's power of eminent domain.[20]

A special problem is presented by the attempt of one private corporation to take for public use land already devoted by a second private corporation to the identical use. Where this would mean a shift in ownership only and not at all a shift in use, the taking is denied. The implication is that taking from *A* and giving to *B* is not due process of law and is beyond even the legislature's power if *A* and *B* are private corporations.[21] What seems actually to be meant is that although the use is and continues to be a public one, in such circumstances the *taking* can have no public purpose. Where the shift is from private to public ownership, or there is an appreciable change in the manner of use, the rule has no

[16] Yadkin County v. City of High Point, 217 N.C. 462, 8 S.E. 2d 470 (1940); Board of Com'rs for Clarendon County v. Holliday, 182 S.C. 510, 189 S.E. 885 (1937); Ridgewood v. Glen Rock, *supra* note 14; City of Norton v. Lowden, 84 F. 2d 663 (C.C.A. 10th 1936); Masonic Cemetery Ass'n v. Gamage, 38 F. 2d 95 (C.C.A. 9th 1930); Portland Ry. Light & Power Co. v. Portland, 181 Fed. 632 (C.C. Ore. 1910).

[17] Vermont Hydro-Electric Corp. v. Dunn, 95 Vt. 114, 112 Atl. 223 (1921).

[18] State *ex rel.* Northwestern Electric Co. v. Superior Court, 28 Wash. 2d 476, 183 P. 2d 802 (1947); Denver v. Board of Com'rs of Arapahoe County, 113 Colo. 150, 156 P. 2d 101 (1945); *see* Fry v. Jackson, 264 S.W. 613, 618 (Tex. Civ. App. 1924).

[19] State v. Superior Court, 91 Wash. 454, 157 Pac. 1097 (1916).

[20] Georgia v. Chattanooga, 264 U.S. 472 (1924); *see* Florida State Hospital for the Insane v. Durham Iron Co., 194 Ga. 350, 354, 21 S.E. 2d 216, 219 (1942).

[21] West R. Bridge Co. v. Dix, 6 How. 507 (U.S. 1848); Charles R. Bridge v. Warren Bridge, 11 Pet. 420 (U.S. 1837).

application.[22]

It has been assumed to this point that the decision of the holder of land to resist condemnation was sound to the extent that the existing and proposed uses were inconsistent; that the continuation of one prevented the introduction of the other. Contrary to the tendency under some of the other rules against review of the merits of the parties' determinations, the factual question of inconsistency of use seems to be held open to full judicial review in any case. If the court finds the uses consistent, taking will be allowed under general authority to the extent necessary to accommodate both uses. The test of consistency is said to be that there be no material interference with the existing use.[23] The capacity of these doctrines to pinch-hit for the legislative will in individual cases has not always been satisfactory. Logically they are inconsistent with the rule applied when privately used property is condemned, that selection of the specific land is a legislative function delegated to and lying in the discretion of the condemnor. Confronted with conflicting claims of public interest in a situation in which refusal to decide would itself be a substantive resolution, the courts seem to have accepted full judicial review and a considered substantive adjustment as the only way to promote justice. The essentially legislative character of the determination of necessity has occasionally caused legislatures to attempt further spelling-out of their desires, in the form of substantive rules similar to those already discussed. Sometimes the trend is reversed, and the court is expressly directed to make substantive adjustments. When this is done by state constitutional provisions the only question that can be raised is whether it represents wise political policy. When it is done by statute there is the further question whether it does not violate the separation of powers.[24]

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[22] Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897); State *ex rel.* Washington Water Power Co. v. Superior Court, 8 Wash. 2d 122, 111 P. 2d 577 (1941).

[23] Freeman Gulch Mining Co. v. Kennecott Copper Corp., 119 F. 2d 16 (C.C.A. 10th 1941); Clark v. Boysen, 39 F. 2d 800, 816 (C.C.A. 10th 1930), *cert. denied*, 282 U.S. 869 (1931); Greenup County v. Chesapeake & O. Ry., 71 F.Supp. 652 (E. D. Ky. 1947); Cocanougher v. Zeigler, 112 Mont. 76, 112 P. 2d 1059 (1941).

[24] On this general problem, compare, with the view that the determination of necessity is legislative, Cocanougher v. Zeigler, *supra* note 23; Cleveland v. Detroit, 322 Mich. 172, 33 N.W. 2d 747 (1948); Village of Bangor v. Hussa Canning & Pickle Co., 208 Wis. 191, 242 N.W. 565 (1932); Peavey-Wilson Lumber Co. v. Brevard County, 31 So. 2d 483 (Fla. 1947). As to the separation of powers, see Barmel v. Minneapolis-St. Paul Sanitary Dist., 201 Minn. 622, 277 N.W. 208 (1938); Searle v. Yensen, 118 Neb. 835, 226 N.W. 464 (1929). Statutes requiring that the proposed use be "more necessary" could be construed as a guide to the discretion of the condemnor. Matthaei v. Housing Authority, 177 Md. 506, 9 A. 2d 835 (1939).

The difficulty is caused by this running-together of the two questions posed in the opening paragraph of this article, and always posed when one agency contends with another for the same land. The more inclusive and appealing query is: what substantive adjustment of this particular conflict represents the best pattern of use of the land involved?

JUDICIAL DETERMINATION OF MAXIMUM PUBLIC BENEFIT

In theory, this question may be answered by a return to the original basis of the doctrine of eminent domain. The power finds its justification in the necessity of appropriating the property of some one person for the benefit of the entire community. From this standpoint there is nowhere any disagreement upon the test by which the relative value of all substantive adjustments is to be measured. Through all claims, theories, statutes and decisions runs the ideal: that pattern of land use is best which produces the maximum public benefit. In every case in which the court weighs the desirability of any substantive adjustment, the following process is applied to some extent, whether articulated or not. The existing use, taken alone, is assigned a value in terms of public benefit. The proposed use alone is likewise assigned a value in terms of public benefit. In assigning these values, some account is taken of the reasonable potentialities of each use if allowed to be developed unhindered. Next, the effect of introduction of the proposed on the existing use is considered. It may have no effect, it it may increase the value of the existing use, or it may decrease it. When it is said that the existing use would be "destroyed" it is sometimes meant that it would have to be relocated, and the possibility of relocation and the value of the use as relocated should then be considered. A value in terms of public benefit is thus assigned to the existing use as affected by the proposed use. The same process is carried out on the proposed use, and a value is assigned which represents the public benefit derived from the proposed use as affected by continuation of the existing use. The values of the two affected uses are totalled.

There are now available for comparison three quantities, representing existing use, proposed use and total of affected uses. A comparison of the values is made. If the value of the existing use is equal to or greater than either of the other figures the shift should be completely denied since it would result in no increase in public benefit. If the total of the affected uses is the highest the taking will be allowed to the extent necessary for the land to accommodate both uses. If the proposed use has the highest value of the three the taking should be allowed in full, even if the result is to destroy or cause relocation of the existing use.

The legal theories of adjustment already discussed now appear as factors in making the determination described. Each is proper for controlling the substantive adjustment in one kind of case, but not for application without regard to all the others. The doctrine of consistent uses represents the sound substantive solution when the total of affected uses is the highest of three assigned values. The doctrine of higher use states the result when the proposed use has the highest value. The rule against "taking from *A* and giving to *B*" is merely one of the instances in which the existing use has a value at least equal to any of the others, so that the shift should be completely denied; and its inapplicability, for example when private ownership is to be exchanged for public ownership, is based upon a resulting rise in valuation of the proposed use in terms of public benefit. The rule of priority in time should be applied substantively only when existing use is at least equal to either of the other values, although it seems more frequently to represent a refusal to attempt evaluation. But refusal to evaluate merely amounts to assuming that all three values are equal.

Any of the doctrines is "wrong" from a substantive point of view if applied in all cases, because this would include the inevitable instances in which the single value enthroned by one particular doctrine is not the highest of the three. The synthesis suggested must be taken as a theoretical solution only. In application, the difficulty is one of assigning values—a difficulty which will be referred to hereafter.

THE FEDERAL HIERARCHY: JURISDICTIONALLY INTEGRATED ADJUSTMENT

Inter-agency conflicts in land acquisition involving the United States have presented a somewhat different context from that already considered. The federal relationship among governments has suggested and there has gradually developed, a different method of adjustment of such conflicts. It is based, not on review and substantive formulation, but on a principle of delineation of the respective authorities of the contending agents.

This method considers the federal and the state and local governments as forming a hierarchy. In its constitutional field the federal government leads the list by virtue of the supremacy clause of the Constitution.[25] The United States may authorize its agents to take land for purposes within the sphere of federal control, and neither a state nor a local government can prevent, condition or interfere with the taking. Nor does it matter what previous public use the subordinate government was making of the land. In *United States v. Carmack*,[26] the Federal Works Administrator and the

[25] U. S. CONST. ART. IV.

[26] 329 US. 230 (1946).

Postmaster General jointly selected,[27] as site for a federal post office and customshouse, land held by a city in trust for and used as a park, courthouse, city hall and public library. The United States brought condemnation proceedings. The city did not object to the taking, but the heir of the grantor in trust claimed that the trust and the prior governmental and public use of the property rendered it immune from condemnation. It was held that the federal agents had discretion to select the site despite conflicting local governmental uses; and that their decision was not reviewable unless possibly for bad faith, or arbitrary or capricious action, which was not shown. The power of eminent domain of the federal government exercised within its sphere was held to be supreme. The same theory has been followed in other cases.[28]

The doctrine that the decision of a superior government or its agency to take particular land should control over the resistance of a subordinate government user seems to lead directly to a rule for resolution of conflicts in the converse situation. If a government lower in the hierarchy should attempt to take land held by a superior, the latter's decision that the shift should not be made must control. When the agency of the superior government possesses the power of condemnation any other result seems impossible, since it could immediately retake.

As early as 1849, the Supreme Court had held that a city could not open streets through a federal reservation devoted to military

[27] Under 25 STAT. 357 (1888), 36 STAT. 1167 (1911), 40 U.S.C. § 257 (1946); 44 STAT. 630 (1926), 40 U.S.C. § 341 (1946).

[28] Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941); United States *ex rel.* TVA v. Welch, 327 U.S. 546 (1946); Kohl v. United States, 91 U.S. 367 (1875); United States v. Montana, 134 F. 2d 194 (C.C.A. 9th 1943), *cert denied sub. nom.* Montana v. United States, 319 U.S. 772 (1943); Minnesota v. United States, 125 F. 2d 636 (C.C.A. 8th 1942); C. M. Patten Co. v. United States, 61 F. 2d 970 (C.C.A. 9th 1932), *rev'd on other grounds*, 289 U.S. 705 (1933); United States v. 385 Acres of Land, 61 F. Supp. 239 (E. D. Wis. 1945); United States v. .8677 Acre of Land, 42 F. Supp. 91 (E. D. S.C. 1941); United States v. 2.74 Acres of Land, 32 F. Supp. 55 (E. D. Ill. 1940). Cases dealing more specifically with the extent of the review are United States v. New York, 160 F. 2d 479 (C.C.A. 2d 1947), *cert. denied*, 331 U.S. 832 (1947); United States v. Merchants Transfer & Storage Co., 144 F. 2d 324 (C.C.A. 9th 1944); United States v. Meyer, 113 F. 2d 387 (C.C.A. 7th 1940), *cert. denied sub. nom.* Meyer v. United States, 311 U.S. 706 (1940); United States v. 40.75 Acres of Land, 76 F. Supp. 239 (N.D. Ill. 1947). The only square holding that there is no judicial review whatever of the condemnor's determination, in line with the legislative theory, is a case which refuses to admit evidence offered to show bad faith. United States v. 243.22 Acres of Land, 129 F. 2d 678 (C.C.A. 2d 1942). Some of the decisions may have turned upon the question whether Congress, in passing statutes allowing the condemnor to take the land upon a declaration and deposit prior to the determination of compensation, intended to separate the taking from other features of the proceedings. See United States v. Catlin, 324 U.S. 229 (1945).

purposes.[29] One factor served to obscure the application of the rule. At some periods the United States makes no active use of particular land owned by it. An early decision, not discerning any interference with federal governmental activity, attempted to split the capacity of the United States into "governmental" and "proprietary" categories, and to allow subjection of such federal land to the state's power of eminent domain on the theory of proprietary holding.[30] The distinction seems gradually to be waning in other fields, and its application to the federal government in this situation is unsound for a number of reasons. It is decidedly contrary to the conception of the federal government as one of limited delegated powers. Every acquisition, holding or disposition of property by the United States depends upon proper exercise of a constitutional grant of power and is thus governmental.[31] The federal decision against allowing taking by an inferior government must therefore control under the supremacy principle.

This conclusion is even more strongly required by Article IV, Section 3, of the United States Constitution, which expressly grants to Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.[32] This carries full power to protect such lands, to control their use and to prescribe in what manner others may acquire rights in them.[33] In *Utah Power and Light Company v. United States*,[34] the utility located its reservoir and other equipment on vacant land of the United States open for settlement and sale and not then appropriated or used for any governmental activity. The United States sued to enjoin continued occupation by the utility, which resisted on the ground of consent under federal statutes and also claimed that the state's grant of eminent domain to it enabled it to appropriate idle land of the United States. The decision was that consent was lacking, and that the public lands of the United States were held not as by a proprietor, but in trust for all the people.[35] By this decision the proprietary category seems to be

[29] United States v. Chicago, 7 How. 185 (U.S. 1849).

[30] United States v. Railroad Bridge Co., Fed. Cas. No. 16,114 (C.C.N.D. Ill. 1855); *see* United States v. Chicago, *supra* note 29, at 194. *But see* Van Brocklin v. Tennessee, 117 U.S. 151, 161 (1886).

[31] United States v. Allegheny County, 322 U.S. 174 (1944).

[32] *Cf.* ART. I, § 8, granting exclusive legislative jurisdiction over all places purchased by the consent of the legislature of the state in which the same shall be for the location of forts, magazines, arsenals, dock yards and other needful buildings.

[33] United States v. California, 332 U.S. 19, 33 (1947); United States v. San Francisco, 310 U.S. 16, 29 (1940).

[34] 243 U.S. 389 (1917).

[35] *Accord*: Utah Power & Light Co. v. United States, 230 Fed. 328 (C.C.A. 8th 1915), *modified on another point*, 242 Fed. 292 (C.C.A. 8th 1917). The court

eliminated, and federal land is subject to condemnation by a subordinate government or its agency only with the consent of Congress. Subsequent cases have taken this view.[36]

Overtones from the older theories of substantive adjustment are found woven into the hierarchy theory; only in the recent series of decisions involving the state and federal governments has the hierarchy taken the definite jurisdictional shape described here. The former overlapping and confusing employment within the hierarchy theory of the governmental-proprietary distinction has been noted. The doctrine of consistency of uses has been used in at least one case to produce a result possibly contrary to the hierarchy theory.[37] The constitutional distribution of powers has also been occasionally obscured by casting it in terms of the rule of higher use, carrying along the implication of full judicial review and the possibility that the subordinate government, if the court finds its use equal or higher, may oust the superior government from its constitutional field.[38] The recent decisions indicate that these confusions will be eliminated in the future, and the method of jurisdictionally integrated adjustment will completely replace all theories of judicial substantive adjustment in federal-state conflicts.

Legislative Determination of Maximum Public Benefit

The cases already noted have involved federal officials or federal corporate agencies exercising delegated discretion to determine what pattern of land use would produce the maximum public benefit in the particular situation. A wider ambit for the hierarchy theory has resulted from the growth of federal regulation of public service corporations under the commerce power. It seems plain that the grantee of a power of eminent domain from the federal government, even if a private corporation or individual, is to that extent the agent of the federal government; particularly in the light of the more recent recognition that every federal purpose is governmental and not proprietary as regards condemnation problems. In *Missouri* ex rel. *Camden County v. Union Electric Light and Power Company*,[39] the defendant was licensed under the Federal

said, 230 Fed. at 336, that the lands were held ". . . in trust for all the people of all the states to pay debts and provide for the common defense and general welfare . . . [T]hey are held for these supreme public uses when and as they arise."

[36] Minnesota v. United States, 305 U.S. 382 (1939); Town of Okemah v. United States, 140 F. 2d 963 (C.C.A. 10th 1944); *cf.* Griffin v. United States, 168 F. 2d 457 (C.C.A. 8th 1948).

[37] United States v. Southern Power Co., 31 F. 2d 852 (C.C.A. 4th 1929).

[38] United States v. Jotham Bixby Co., 55 F. 2d 317 (S.D. Cal. 1932), *aff'd sub. nom.* C. M. Patten Co. v. United States, 61 F. 2d 970 (C.C.A. 9th 1932), *rev'd on other grounds*, 289 U.S. 705 (1933); United States v. Carmack, 151 F. 2d 881 (C.C.A. 8th 1945), *rev'd*, 329 U.S. 230 (1946).

Water Power Act[40] to construct a dam across a navigable river, which would flood land occupied by a county courthouse and jail, as well as sections of public highways and land included in school districts. The project was to improve navigation, but defendant was authorized to use for industrial purposes the hydro-electric power created. The power of eminent domain was expressly delegated to such licensees. The state and county sued to enjoin the construction of the dam. It was held that the defendant had power to acquire by eminent domain the lands already devoted to a public purpose within the state.

The number of such grants of condemnation power is small.[41] Most public service corporations receive their powers of eminent domain from the state government. There is, however, another factor to be considered. At present many public utilities engage in operations within the federal sphere, and are subject to regulation by such federal administrative agencies as the Federal Power Commission, Interstate Commerce Commission, Federal Communications Commission, Civil Aeronautics Board, and the like.[42] Within statutory limits, approval of one of these agencies is necessary before the utility can extend or abandon lines, routes or operations, or construct, alter or dismantle facilities. The approval takes the form of certifying, after consideration, that the public interest will be served thereby. When the extension, abandonment or other activity involves acquisition and use of new land, or the giving up of land previously used, as it very frequently does, this means virtual agency control of the utility's decision on land acquisition or shift in land use. In some situations the agency can order the change on application of interested parties other than the utility, or on its own initiative. This regulatory power eliminates conflicts in land use between utilities in the single field regulated. Since all the agencies are of the same government, there is the possibility of executive resolution of conflicts between utilities not subject to the same commission. It would seem that agency approval renders

[40] 42 F. 2d 692 (W. D. Mo. 1930), *appeal dismissed*, 52 F. 2d 1080 (C.C.A. 8th 1931).

[41] 41 STAT. 1077 (1920), 16 U.S.C. §§ 791–823 (1926), now the Federal Power Act.

[41] One is contained in the Natural Gas Act, 52 STAT. 821 (1938), 15 U.S.C. §§ 717–717w (1946); 61 STAT. 459 (1947), 15 U.S.C. § 717f (Supp. 1948).

[42] 41 STAT. 1077 (1920) as amended, 16 U.S.C. §§ 791–825 (1946); 52 STAT. 821, 15 U.S.C. §§ 717–717w (1946); 61 STAT. 821 (1938), 15 U.S.C. §§ 717–717w (1946); 61 STAT. 459 (1947), 15 U.S.C. § 717f (Supp. 1948) (Federal Power Commission); 24 STAT. 379 (1887) as amended, 49 U.S.C. §§ 1–400, 901–1100 (1946) (Interstate Commerce Commission); 52 STAT. 977 (1938) as amended, 49 U.S.C. §§ 401–682 (1946) (Civil Aeronautics Board); 48 STAT. 1064–1105 (1934) as amended, 47 U.S.C. §§ 151–609 (1946) (Federal Communications Commission).

the utility's decision to take specific land by condemnation or to resist the taking, an agency decision and therefore a legislative and governmental decision.

The cases which treat the matter show that the commissions in considering which decisions best serve the public convenience and necessity are authorized to be responsive to other factors as well as to interstate commerce and the problems of the particular utility field.[43] In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*,[44] plaintiff applied to the Federal Power Commission for a license to construct a power project on a navigable river in Iowa. The Federal Power Act required applicants to submit to the commission satisfactory evidence of compliance with the laws of the state within which the project is to be located. The laws of Iowa required a permit from the State Executive Council to use water from state streams for industrial purposes, upon statutory conditions which were incompatible with the project. The Commission dismissed plaintiff's application for failure to submit evidence of compliance with the state law. The Supreme Court held that the Iowa statute could not give the state veto power over the federal project, and that the relative importance of the national and state interests was to be weighed by the Commission: "It is the Federal Power Commission rather than the Iowa Executive Council that must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others."[45]

In view of all this, the following extension of the hierarchy theory is conceivable for the future. If the condemnor's decision that its proposed use of specific land is more necessary than the holder's, or vice versa, is approved or ordered by a regulatory agency having jurisdiction so to approve or order upon a consideration of the public benefit including factors relevant in both fields of use, the decision becomes an agency decision. It takes its rank under the hierarchy theory with the federal government, for which the agency acts. Whether the regulated corporation gets its power of eminent domain from the state or the federal government seems immaterial. Indeed, when the decision is to resist condemnation, the fact that the holder has not the power of eminent domain should make no difference. The decision of any agency would be subject to the amount of judicial review normally provided for its agency decisions. The purpose and effect of the extension would be to bring to the deciding task in the first instance such equipment as the

[43] Purcell v. United States, 315 U.S. 381 (1942); Interstate Commerce Commission v. Railway Labor Executives Ass'n, 315 U.S. 373 (1942); Colorado v. United States, 271 U.S. 153 (1926).

[44] 328 U.S. 156 (1946).

[45] *Id.* at 182.

agency can furnish in staff, experience, and expertness in specialized fields of land use.

This possibility is not without its problems. Its mechanical simplicity may have the result, in hard cases, of arrogating to the agency decision an effect which might be beyond the probable intention of the legislature.[46] It may be difficult to determine whether the agency decision is actually a finding that in the public interest one pattern of use of particular land is more valuable than another, with all relevant factors considered, as distinct from mere approval or ordering of (for example) an extension or abandonment of routes or lines, without full consideration of the conflict of land uses involved if the decision is carried out in a particular way.[47] Further, when the national government is not involved, and state and local levels are reached, the outlines of the hierarchy necessary to the jurisdictional method are indefinite. This is due to the present changing condition of state-local relations. Counties, townships, municipalities, and special-purpose districts form a stratification many layers deep over the same land area. Their relative authorities are uncertain because the distribution of state and local powers among them is uncertain.[48] Adjustment of land use conflicts by state planning agencies is probably impossible because of their present elementary stage of development, even if complete centralization in such bodies of adjustment of public use of lands be found acceptable.[49] The general re-ordering of these complex relations and the substitution of state adminstrative supervision for the awkward process of detailed legislative regulation of them is frequently urged.[50] To the reasons for such reform may be added the needs of the present problem.

This does not prevent all application of the jurisdictional theory in the state field. Mere elimination of the term "proprietary" solves

[46] *Cf.* Mr. Justice Douglas, concurring in Carmack v. United States, 329 U.S. 230, 248 (1946).

[47] The powers of the regulatory commissions vary from statute to statute. For a discussion of the factors considered by the ICC in control of construction and abandonment, see CHERINGTON, THE REGULATION OF RAILROAD ABANDONMENTS (1948); Marshal, *Railroad Certificates of Convenience and Necessity Issued under the Interstate Commerce Act*, 22 ORE. L. REV. 215, 331 (1943).

[48] Council of State Governments, *Report of the Committee on State-Local Relations* (1946), contains description and analysis.

[49] On the status of such agencies, see COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 269–273 (1948–1949). Statewide zoning agencies are nonexistent, and the power of local zoning commissions over land in public use is in doubt. State *ex rel.* Helsel v. Board of Com'rs of Cuyahoga County, 19 N.E. 2d 698 (Ohio C.P. 1947), *aff'd* 78 N.E. 2d 694 (Ohio App. 1948), *appeal dismissed*, 79 N.E. 2d 911 (Ohio 1948); Taber v. Benton Harbor, 280 Mich. 522, 274 N.W. 324 (1937).

[50] Council of State Governments, *Report of the Committee on State-Local Relations* (1946) *passim*.

the conflict of state and state on an integrated basis, without change in result. The extraterritorial landholding powers of one state, although governmental, must be subordinate to the powers of the state in which the land lies.[51] Some resolution of problems within the individual state has already emerged. If the condemnor is a state agency, for example, a highway commission, which takes and holds title in the name of the state and uses it for general state purposes, courts now treat its exercise of eminent domain as being that of the sovereign itself.[52] Such an agency's selection of specific land despite conflicting use by a local body is authoritative. The rule has been applied to refuse condemnation of even "idle" state-held land in the converse situation.[53] These are steps in the direction of integrated adjustment, avoiding judicial substantive formulations.

Tracing the lines of authority between state and local agencies is possible in other situations. In addition to highways, airports, and other public works, the general state interest in such fields as utility regulation, conservation, and education is increasingly recognized. To the extent that an administrative body with state-wide jurisdiction has been delegated the authority to perform a general state (as distinct from local) function, the agency-decision principle suggested under the federal method may be applicable. State public service commissions exercise in the intra-state field a practical control, similar to that of federal agencies, over decisions on land acquisitions and relinquishment by public service corporations. Such agency decisions should be treated as legislative determinations by the state, in case of conflict.

On the above descriptions, some comparison of the two diverse methods of adjustment of inter-agency conflicts in land use is possible.

COMPARISON AND CONCLUSION

On its own level of abstraction, as an ideal to be sought, although not attainable with concrete precision in a given case, the method of judicial substantive adjustment seems unobjectionable. In practice it throws all the stress of the conflict upon the evaluation of land uses in terms of public benefit and raises the second question suggested at the beginning of this article. Who shall make the

[51] A case treating the effort of one state to condemn land in another is Wayne County Court v. Louisa & Ft. Gay Bridge Co., 46 F. Supp. 1 (S.D. W.Va. 1942).

[52] State Highway Commission v. City of Elizabeth, 140 Atl. 335 (N.J. Ch. 1928), *aff'd sub. nom.* City of Elizabeth v. State Highway Commission, 103 N.J. Eq. 376, 143 Atl. 916 (Ct. Err. & App. 1928); Town of Winchester v. Cox, 129 Conn. 106, 26 A. 2d 592 (1942).

[53] *In re* Cruger Ave., 238 N.Y. 84, 143 N.E. 799 (1924); Steelhammer v. Clackamas County, 170 Ore. 505, 135 P. 2d 292 (1943) *semble.*

series of decisions that one pattern of land use is preferable, all things considered, to another?

It is better to draw a few clear lines of authority than to expose each case to the toils of litigation. From the standpoint of physical efficiency in land use, the evaluation of public interest is a matter of engineering. From the standpoint of social goals involving eminent domain for their implementation, it is a matter of political policy. Administering the growing and incessant procession of such evaluations requires steady attention to both statecraft and technology; day-to-day balancing of aims, needs and facilities; continuous forethought on possibilities, developments and demands.

The sound basic position of the courts is shown in the rule they apply to condemnations of property in private use. The devotion of property to public needs is a legislative problem, to be determined by the legislature and its agents. Applications of the formula of substantive adjustment for maximum public benefit, balancing under rules of consistency, of higher use, are for such agents. In the normal case, when landowner and legislative agent disagree, the latter has the authority of the community behind him. This is the foundation of eminent domain. When legislative agents disagree, the question for the judiciary is still, not whose proposal seems more desirable, but who has authority in the matter at hand. Courts have made substantive adjustments only because the boundaries of the respective authorities are not clear, and the common principal (the legislature) is not and cannot be accessible for continuous consultation as to authority. The method of jurisdictionally integrated adjustment furnishes the more satisfactory solution of the problem.